

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SKOKOMISH INDIAN TRIBE,

Plaintiff,

v.

PETER GOLDMARK, et al.,

Defendants.

CASE NO. C13-5071JLR

ORDER GRANTING MOTION  
TO SEAL

Before the court is *amici curiae* the Hoh Tribe and Quileute Tribe's (the "Hoh and Quileute") renewed motion to seal. (Mot. (Dkt. ## 92, 94).) The Hoh and Quileute ask the court to: (1) seal portions of the Skokomish Indian Tribe's (the "Skokomish") response memorandum to the Hoh and Quileute's motion for leave to participate as *amici curiae* (Skokomish Resp. (Dkt. # 76)); (2) maintain under seal the Hoh and Quileute's unredacted reply memorandum regarding their motion for leave to participate as *amici curiae* (Dkt. # 80); (3) seal portions of the Skokomish's response memorandum to the Hoh and Quileute's first motion to seal (Resp. 1 (Dkt. # 82)); (4) maintain under seal the

1 Hoh and Quileute's unredacted reply memorandum regarding their first motion to seal  
 2 (Dkt. # 88); (5) maintain under seal the Hoh and Quileute's unredacted renewed motion  
 3 to seal (Mot. (Dkt. # 94)); (6) maintain under seal the unredacted declaration of Lauren  
 4 King and associated exhibit filed in support of the Hoh and Quileute's renewed motion to  
 5 seal (King Decl. (Dkt. # 95); *id.* Ex. A (Dkt. # 95-1)); (7) seal portions of the  
 6 Skokomish's response memorandum to the Hoh and Quileute's renewed motion to seal  
 7 and the memorandum's associated exhibits (Resp. 2 (Dkt. # 98); *id.* Ex. B (Dkt. # 98-2);  
 8 *id.* Ex. C (Dkt. # 98-3)); and (8) maintain under seal the Hoh and Quileute's unredacted  
 9 reply memorandum regarding their renewed motion to seal (Reply (Dkt. # 100)). (*See*  
 10 Mot. at 1, 5; Reply at 1-2, 4-5.) Having reviewed the motion, all submissions filed in  
 11 support of and opposition thereto, the balance of the record, and the applicable law, and  
 12 considering itself fully advised, the court GRANTS the Hoh and Quileute's renewed  
 13 motion to seal (Dkt. ## 92, 94).

14 Under Local Rule LCR 5(g) "[t]here is a strong presumption of public access to  
 15 the court's files." Local Rules W.D. Wash. LCR 5(g)(3). To rebut this presumption the  
 16 party seeking to seal a document must file a motion that includes:

17 (A) a certification that the party has met and conferred with all other parties  
 18 in an attempt to reach agreement on the need to file the document under  
 19 seal, to minimize the amount of material filed under seal, and to explore  
 redaction and other alternatives to filing under seal; this certification must  
 list the date, manner, and participants of the conference.

20 (B) a specific statement of the applicable legal standard and the reasons for  
 21 keeping a document under seal, with evidentiary support from declarations  
 where necessary.

22 *Id.* This rule places the burden on the moving party to come forward with an applicable

1 legal standard justifying the seal and to produce evidentiary support showing that the  
2 standard is met. *See id.* The Hoh and Quileute’s renewed motion to seal satisfies Local  
3 Rule LCR 5(g).

4 First, the Hoh and Quileute have met and conferred as required by Local Rule  
5 LCR 5(g)(A). Their renewed motion certifies that their counsel have “met and conferred  
6 with all other parties in an attempt to reach agreement on the need to file the  
7 document[s]” at issue under seal, as required by Local Rule LCR 5(g)(3)(A). (*See*  
8 *generally* Certification of Meet and Confer (Dkt. # 92-1).) The certification details the  
9 parties’ discussion regarding the documents subject to the renewed motion to seal. (*See*  
10 *id.* at 1.) The certification also lists the date, manner, and participants of the conference.  
11 (*See id.*) Furthermore, the Skokomish do not refute any part of the Hoh and Quileute’s  
12 certification.<sup>1</sup> (*See generally* Resp. 2) Thus, the Hoh and Quileute’s renewed motion to  
13 seal satisfies Local Rule LCR 5(g)(3)(A).

14 Second, as required by Local Rule LCR 5(g)(B), the Hoh and Quileute come  
15 forward with an applicable legal standard justifying their renewed motion to seal. The  
16 Hoh and Quileute point the court to numerous cases in which courts of the Ninth Circuit  
17 have accepted private confidentiality agreements as “good cause” justifying a motion to  
18 seal non-dispositive motions and associated documents. (*See* Mot. at 3 (citing *Pike v.*  
19 *Hester*, No. 3:12-CV-00283-RCJ, 2013 WL 3491222, at \*7 (D. Nev. July 9, 2013);  
20 *Boucher v. First Am. Title Ins. Co.*, No. C10-0199RAJ, 2011 WL 5299497, at \*5 (W.D.

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22 <sup>1</sup> *See* Local Rules W.D. Wash. CR 7(b)(2) (“If a party fails to file papers in opposition to  
a motion, such failure may be considered . . . an admission that the motion has merit.”).

1 Wash. Nov. 4, 2011); *Mesa Bank v. Cincinnati Ins. Co.*, No. 09-12-PHX-GMS, 2009 WL  
 2 247908, at \*2 (D. Ariz. Feb. 3, 2009)).) The Hoh and Quileute, through their renewed  
 3 motion to seal, only request that non-dispositive motions and some associated documents  
 4 be sealed. (*See* Mot. at 1, 5; Reply at 1-2, 4-5.) Thus, the standard in *Pike*, *Boucher*, and  
 5 *Mesa* applies here.

6 The confidentiality agreement between the Skokomish, Hoh, and Quileute justifies  
 7 the renewed motion to seal. The Skokomish entered into a confidentiality agreement  
 8 with the Hoh and Quileute earlier this year. (*See* King Decl. at 1; *id.* Ex. A at 7.) The  
 9 Hoh and Quileute assert that a clause in that agreement binds the “Skokomish, Quileute,  
 10 and Hoh to continuing duties of confidentiality, including a duty to keep the fact of the  
 11 existence of the document itself confidential.” (Mot. at 1-2.) The Skokomish do not  
 12 dispute this interpretation.<sup>2</sup> (*See generally* Resp. 2.)

13 Despite the confidentiality agreement, the Skokomish have disclosed and  
 14 discussed the agreement numerous times in their pleadings, and even prior to this  
 15 proceeding. (*See* Skokomish Resp. at 3; Resp. 1 at 1-3; Resp. 2 at 1-4; *id.* Ex. B at 2; *id.*  
 16 Ex. C at 4.) The Skokomish assert that their tribal constitution requires them to disclose  
 17 the existence of the agreement, and that their prior disclosures render the confidentiality  
 18 requirement of the agreement moot. (*See* Resp. 2 at 2-3.) The court disagrees. Only the  
 19 benefiting party can waive a contractual clause. *See Mike M. Johnson, Inc. v. Cnty. of*  
 20 *Spokane*, 78 P.3d 161, 166 (Wash. 2003). “A party to a contract may waive a contract

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 22 <sup>2</sup> *See* Local Rules W.D. Wash. CR 7(b)(2) (“If a party fails to file papers in opposition to  
 a motion, such failure may be considered . . . an admission that the motion has merit.”).

provision, which is meant for its benefit, and may imply waiver through its conduct.” *Id.* “Waiver by conduct, however, ‘requires unequivocal acts of conduct evidencing an intent to waive.’” *Id.* (quoting *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 890 P.2d 1071, 1074 (Wash. Ct. App. 1995)). Even though the confidentiality clause could benefit any party to the agreement, the Hoh and Quileute are the parties attempting to enforce the confidentiality clause, and there is no evidence before the court that the Hoh and Quileute “unequivocally waived” their right to enforce the confidentiality clause. *Id.* Thus, the confidentiality provision is enforceable, and a proper basis to justify the Hoh and Quileute’s renewed motion to seal.<sup>3</sup>

The court therefore GRANTS the Hoh and Quileute’s motion to seal the non-dispositive documents referencing the agreement between the Skokomish, Hoh, and Quileute (Dkt. ## 92, 94). The Skokomish are ordered to file on the docket redacted versions of the following documents: (1) the Skokomish response memorandum to the Hoh and Quileute’s motion for leave to participate as *amici curiae* (Dkt. # 76); (2) the Skokomish’s response memorandum to the Hoh and Quileute’s first motion to seal (Dkt. # 82); and (3) the Skokomish’s response memorandum to the Hoh and Quileute’s

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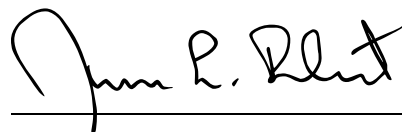
<sup>3</sup> The court finds the Skokomish’s remaining argument in opposition to the renewed motion to seal similarly unavailing. The Skokomish claim that Federal Rule of Civil Procedure 26 authorizes them “to disclose the existence of the [agreement] and the nature of communications under it” because the agreement is likely discoverable. (Resp. 2 at 4.) Rule 26 applies within the context of discovery, and the Skokomish have not disclosed the agreement within the context of discovery. (*See generally* Mot.; Reply.) Furthermore, the same “good cause” standard discussed above applies to motions seeking a protective order over materials disclosed during discovery. (*See Mesa Bank*, 2009 WL 247908, at \*1 (citing *San Jose Mercury News, Inc. v. U.S. Dist. Court--N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999)). Thus, the above analysis would also apply within the discovery context.

1 renewed motion to seal and its associated exhibits (Dkt. # 98, 98-2, 98-3). The  
2 documents shall be redacted to conceal any mention of or reference to the confidentiality  
3 agreement or its contents. (*See* Reply at 4-5.) And the court will seal the unredacted  
4 versions of these documents (Dkt. ## 76, 82, 98, 98-2, 98-3).

5 The court will maintain under seal: (1) the Hoh and Quileute's unredacted reply  
6 memorandum regarding their motion for leave to participate as *amici curiae* (Dkt. # 80);  
7 (2) the Hoh and Quileute's unredacted reply memorandum regarding their first motion to  
8 seal (Dkt. # 88); (3) the Hoh and Quileute's unredacted renewed motion to seal (Dkt.  
9 ## 94); (5) the unredacted declaration of Lauren King and associated exhibit filed in  
10 support of the Hoh and Quileute's renewed motion to seal (Dkt. ## 95, 95-1); and (8) the  
11 Hoh and Quileute's unredacted reply memorandum regarding their renewed motion to  
12 seal (Dkt. # 100).

13 Furthermore, in the interest of judicial economy, any party that references the  
14 confidentiality agreement at issue here in a future pleading must (1) file the pleading with  
15 any reference to the agreement redacted, and (2) file an unredacted version of the  
16 pleading under seal. Failure to do so may result in sanctions.

17 Dated this 20th day of November, 2013.

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20 JAMES L. ROBART  
21 United States District Judge  
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